SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 39

J. J NATHANSON, PETITIONER,

vs.

THE UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

INDEX

	Original	Print
Record from district court of the United States, District of New Jersey	1	1
Docket entries	1	1
Criminal information	4	3
Statement of evidence	10	7
Appearances	10	7
Testimony of Francis Laughlin	11	8
Defendant's Exhibit 1—Search warrant	14	9
Motion to suppress evidence, etc	20	14
Motion for directed verdict	20	15
Petition for appeal	21	15
Order allowing appeal	22	16
Assignments of error	23	17
Citation (omitted in printing)	24	
Stipulation as to record	25	18
Clerk's certificate (omitted in printing)	26	
Proceedings in U. S. C. C. A., third circuit	27	18
Argument and submission (omitted in printing)	27	
Opinion, Thompson, J.	29	18
Judgment	35	22
Clerk's certificate (omitted in printing)	36	
Order allowing certiorari	37	23

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[fols. a-1]

IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

Case No. 1916b

UNITED STATES OF AMERICA

v.

MARTIN NATHANSON and J. J. NATHANSON

DOCKET ENTRIES

June 11, 1930.—Criminal Inf. for viol. Nat. Pro. Act &c. re intox. liquor &c., Act Oct. 28, 1919.

June 11, 1930.—Order for leave to file (same paper).

Jan. 23, 1931.—Req. for wits. Issg. 1 subpœna Issg. 3 copies.

Jan. 28, 1931.—Subs returned (1).

Feb. 2, 1931.—Motions to suppress evidence before Judge Avis.

Feb. 2, 1931.—Decision reserved.

Feb. 2, 1931.—M. M. Petition to suppress evidence & for return of property filed.

Feb. 2, 1931.—J. J. Petition to suppress evidence & for return of property filed.

Feb. 2, 1931.—Copy of Information to F. M. P. Pearse, Newark.

[fol. 2] Sept. 4, 1931.—Memorandum denying motion to suppress evidence, &c. filed (A).

Oct. 22, 1931,—Req. for witnesses Issg. 3 subpœnas. Issg. 4 copies.

Oct. 24, 1931.—Subs. returned (3).

Sept. 26, 1931.—Subs. returned (1).

Nov. 2, 1931.—Req. for witnesses Issg. 3 subpœnas. Issg. 5 copies.

Nov. 5, 1931.—Subs returned (2).

Nov. 7, 1931.—Subs returned (1).

Nov. 9, 1931.—Ordered off to Friday—Motion of F. M. P. Pearson & no jury.

Nov. 9, 1931.—Req. for witnesses Issg. 3 subpœnas. Issg. 5 copies.

Dec. 21, 1931.—Subs returned (1).

Jan. 29, 1932.—Req. for witnesses Issg. 3 subpœnas. Issg. 5 copies.

Feb. 2, 1932.—Subs returned (3).

Feb. 29, 1932.—J. J. N. Plea of Not Guilty. Ord. Bail continued.

Feb. 29, 1932.—Upon consent trial moved before John Boyd Avis, Judge without a jury as to J. J. N.

Feb. 29, 1932.—Stipulation made in record re 2 offenses, defendants, &c.

Feb. 29, 1932.—Motion to suppress, quash &c. (Reserved).

Feb. 29, 1932.—J. J. N. Order motion to suppress, quash Sch. Warrant, &c. denied.

Feb. 29, 1932.—Order exception allowed.

Feb. 29, 1932.—J. J. N. Order motion to direct acquittal denied.

[fol. 3] Feb. 29, 1932.—J. J. N. Order exception allowed.

Feb. 29, 1932.—J. J. N. VERDICT—GUILTY.

Feb. 29, 1932.—J. J. N.—Ordered bail continued.

Feb. 29, 1932.—M. N. Stipulation to bring in M. N. plead herein and abide result of this case in C. C. Appeals—entered in Stenographer's minutes.

Mar. 23, 1932.—J. J. N. Sentence—Fine $500.00 and stand committed in County Jail in custody of Attorney General until said fine is paid (A).

Mar. 23, 1932.—J. J. N. Petition for Appeal filed.

Mar. 23, 1932.—J. J. N. Assignment of Errors filed.

Mar. 23, 1932.—J. J. N. Order allowing appeal; and bail on appeal fixed at $1,000.00 which is to operate as a supersedeas bond (A).

Mar. 23, 1932.—J. J. N. Ordered Clerk take bail Recog. (38,018) drawn and filed.

Mar. 23, 1932.—J. J. N. Citation issued.

Mar. 23, 1932.—J. J. N. Citation returned (service acknowledged & cost bond waived).

Apr. 4, 1932.—M. N. & J. J. N. Order sentence continued to April Term 1932 (see Sundry 4262).

[fol. 4] IN UNITED STATES DISTRICT COURT, OF THE APRIL TERM, A. D. 1930

CRIMINAL INFORMATION—Filed June 11, 1930

DISTRICT OF NEW JERSEY, ss:

Be it remembered, that Walter G. Winne, Attorney of the United States of America for the District of New Jersey, who for said United States in this behalf prosecutes, in his own person comes here into said District Court of the United States for the district aforesaid on this 9th day of June, in the year of our Lord nineteen hundred and thirty, in this same term, leave of court first being had and obtained, and for the United States of America gives the court here to understand and be informed that Martin Nathanson and J. J. Nathanson, on or about the 1st day of May, in the year of our Lord nineteen hundred and thirty, at the City of Atlantic City in said State and District of New Jersey and within the jurisdiction of this court, did knowingly, wilfully and unlawfully possess whiskey, gin, benedictine, alcohol, sherry scotch, kimmel and rye, that is to say, intoxicating liquor, then and there containing more than one-half of one per centum of alcohol by volume, which was then and there fit for use for beverage purposes, pro-
[fol. 5] hibited by law and contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States.

Phillip Forman, U. S. Attorney.

UNITED STATES OF AMERICA,
State of New Jersey, ss:

Before me, Wynn Armstrong, a United States Commissioner for the District of New Jersey, personally appeared Francis B. Laughlin, a duly appointed and qualified officer of the Customs, to wit: Customs Agent in Charge, Philadelphia, who being by me first sworn deposes and says:

1. That on May 1, 1930, having reasonable cause to suspect and believe that certain smuggled merchandise, viz: liquors of foreign origin were concealed in the residence of Martin Nathanson, 41 N. Newton Ave., Atlantic City, N. J., secured a search warrant for this residence from Judge William H. Smathers of Atlantic Co.

2. That on the same day, accompanied by Inspector Boeger, I served the warrant at about 2 P. M.

3. That after being admitted by the colored maid and presented to Mrs. Nathanson, a copy of the search warrant was handed to her.

4. That after permitting Mrs. Nathanson to attempt to get into touch with her husband by telephone, she was advised by me that it was necessary to proceed with the search without further delay, and

5. That accompanied by Mrs. Nathanson, I went to the cellar where I found the following liquors:

[fol. 6] 24 bots. Golden Wedding Rye Whiskey (qts.).
13 bots. Golden Wedding Rye Whiskey (qts.).
23 " Burkes' Gin.
24 " Gilbey's London Dry Gin.
4 " Benedictine.
1 " Creme de Menthe.
24 " Burnett's White Satin Gin.
35 " Ushers' Green Stripe Scotch Whiskey.
2 " Johnnie Walker Scotch Whiskey.
1 keg J. B. Sherriff & Co. Whiskey (partly filled).

6. That in addition to the above-mentioned liquors of foreign origin, I found a number of illegal slot machines and a quantity of alcohol in 5 gal. tins.

7. That when I removed the latter to the garage entrance for closer examination, I was observed by Agents Hommes, Aronson and Glanders of the Prohibition Service, who identified the contents as alcohol and made summary seizure of said alcohol in tins under the National Prohibition Act.

8. That the liquor was checked out and loaded on a truck and an inventory of the liquor removed was made on the back of the warrant and left with Mrs. Nathanson.

9. That the liquor was subsequently transported to Philadelphia and is now in the custody of the Collector in the Appraiser's Stores, 134 S. 2nd St., Philadelphia, Pa.

Frank B. Laughlin, Customs Agent in Charge.

And further deponent sayeth not.

Subscribed and sworn to before me this 20th day of May, 1930. Wynn Armstrong, U. S. Commissioner. (Seal.)

[fol. 7] UNITED STATES OF AMERICA,
State of New Jersey, ss:

Before me, H. R. Voorhees, a United States Commissioner for the District of New Jersey, personally appeared Francis B. Laughlin, a duly appointed and qualified officer of the Customs, to wit: Customs Agent in Charge, Philadelphia, who being by me first sworn deposes and says:

1. That on Thursday, May 1, 1930, having reasonable cause to suspect and believe that smuggled merchandise, viz: certain liquors of foreign origin were concealed in the premises at 117 N. Bartram Ave., Atlantic City, N. J., the occupant of the said residence being J. J. Nathanson, I secured from Judge William H. Smathers of Atlantic Co. a Customs search warrant for the aforesaid house.

2. That on Thursday, May 1, 1930, at about 2.30 P. M. accompanied by Inspector Boeger, I went to 117 N. Bartram Ave., but was unable to secure any response from the occupants.

3. That after an unsuccessful attempt to secure the attention of the occupants, I inspected the place from the outside finding that each of the cellar windows was backed up by a heavy wooden shutter secured by a crossbar.

4. That finding one of the cellar windows slightly open and the wooden shutter behind it about 2″ down from the top, I looked through the opening and observed a quantity of marine equipment, such as sea boots, glasses, engine oil, etc., several casks and some liquor in bundles.

5. That having observed this liquor, I removed the shutter and made an entrance into the cellar followed by Inspector Boeger.

[fol. 8] 6. That in the cellar I found the following liquors of foreign origin:

1 keg Isley Scotch Malt.

14 bots. Golden Wedding Rye Whiskey (qts.).
58 " Lincoln Inn Rye Whiskey.
70 " Booth's Gin.
16 " Benedictine.
16 " Peach Brandy.
1 " Wm. Penn Rye Whiskey.
7 " Johnnie Walker Scotch Whiskey.
11 " Apricot Brandy.
7 " Creme de Cocoa.
21 " Gilka Kimmel.
36 " Otard Cognac.
36 " Champagne.
229 " Chickencock Rye Whiskey (pts.).
85 " Old Mull Scotch Whiskey.

7. That in addition to the above list of liquors, a complete cutting plant was found, consisting of alcohol in 5 gal. tins, distilled water, extracts, such as oil of fennel, oil of juniper, etc., as well as labels, corks, seals and counterfeit revenue stamps.

8. That liquors were checked and an inventory of those removed was made on the reverse of the warrant which was handed to a woman who entered the house in the course of the search and who although obviously a resident there, refused to give her name.

9. That upon removing the alcohol in tins and other materials used in the manufacture of alcoholic beverages to the outside of the house in order to make a closer examination, I was observed by Agents of the Prohibition Service who identified the contents of the tins as alcohol and made summary seizure of them.

[fol. 9] 10. That the alcohol so seized, was retained in the custody of the Prohibition Agent in Charge, H. H. Porter, Atlantic City, N. J.

And further, deponent sayeth not.

F. B. Laughlin, Customs Agent in Charge.

Subscribed and sworn to before me this 24th day of May, 1930. Herbert R. Voorhees, U. S. Commissioner. (Seal.)

Leave of court is granted this eleventh day of June, 1930, to file the within criminal information.

Wm. N. Runyon, Judge.

[fol. 10] IN UNITED STATES DISTRICT COURT, DISTRICT OF NEW JERSEY

No. 1916b

UNITED STATES OF AMERICA

v.

MARTIN NATHANSON and JEREMIAH J. NATHANSON

Statement of Evidence

Transcript of Proceedings Taken Before Honorable John Boyd Avis, February 29, 1932

APPEARANCES

Honorable Phillip Forman, U. S. Attorney, for the Government.

John Griggs, Esq., Assistant U. S. Attorney; Frederic M. P. Pearse, Esq., for the defendant.

The Court: It is stipulated by counsel that the informalities of the information are waived, and it is considered as an information against Martin Nathanson for an alleged violation at 41 N. Newton Avenue, Atlantic City, and against Jeremiah J. Nathanson for an alleged violation at 117 North Bartram Avenue, Atlantic City, both of them having been alleged to have taken place on May 17, 1930. I think that states it, doesn't it?

[fol. 11] Mr. Pearse: Yes. I think it would be better if we let the Government file an amended information in each case.

The Court: Why cannot we take the testimony in the two cases?

Mr. Pearse: We can.

The Court: There are two cases involved, one against Martin and one against Jeremiah J. Nathanson, and it will be

considered by all parties as two cases alleged in one information.

Mr. Pearse: Yes. And then in the event we have to take an appeal that the Government will file an individual information as of time.

Mr. Forman: Yes.

FRANCIS LAUGHLIN, called and sworn as a witness in behalf of the Government, testified as follows:

Direct examination.

By Mr. Griggs:

Mr. Griggs: For the purpose of the record this first proof the Government is endeavoring to establish will be an alleged violation at 117 North Bartram Avenue, Atlantic City, N. J.

The Court: And involving Jeremiah J. Nathanson.

Mr. Griggs: Yes.

Mr. Pearse: I renew my motion to set aside the search warrant and suppress the evidence, and ask that the testimony be heard by the court and decision reserved pending the taking of testimony as to the manner in which the agent obtained his information.

[fol. 12] The Court: Do you mean you want to examine the witness in advance?

Mr. Pearse: Not in advance. I am asking your Honor to reserve decision until the coming in of the testimony in the case.

The Court: All right.

Q. You are a customs official and you were such on May 1, 1930?

A. I was.

Q. Did you apply before the Honorable William H. Smathers, Judge of Common Pleas of Atlantic County for a search warrant for the premises known as 117 North Bartram Avenue, Atlantic City, N. J.?

A. I did.

Q. And as a result of that search warrant did you visit those premises?

A. I did.

Q. And what did you find there?

A. We were unable to get a response when we first got to the house and could not find anyone in and waited around a considerable length of time and no one appeared. I went around and looked into one of the windows in the cellar, and when I looked through there in addition to the ordinary marine equipment, such as a lot of oil in casings and tins and a pair of field glasses, sea boots, and other such equipment I could see a few bottles of liquor. I, thereupon, entered into the cellar and found in a wooden gutter along one side of it the liquors listed on the back of the warrant which was returned.

Q. Now, did you execute that warrant? Did you serve it on anyone?

A. At that time, while the search was still in progress, but shortly after the liquors had been found, a lady who said that she was the occupant of the house, I believe it [fol. 13] was Mrs. Nathanson, if I am not mistaken, appeared there and I handed her the warrant and the receipt showing the liquors on the back.

Mr. Griggs: There is no question, I take it, relative to the alcoholic content?

Mr. Pearse: No.

The Court: Samples were taken, I suppose.

A. Yes, samples were taken, and I turned them over to our chemist, who is present in court.

Mr. Pearse: Subject to our objection as to the competency and relevancy of this testimony, we waive proof of the alcohol content of the merchandise which was seized, and which is enumerated on the back of the copy of the search warrant which with the Court's permission, I will now offer in evidence.

The Court: All right.

(Received and marked Exhibit D-1.)

[fol. 14] DEFENDANT'S EXHIBIT No. 1

Search Warrant

UNITED STATES OF AMERICA,
State of New Jersey:

The President of the United States of America to Francis B. Laughlin (Official title), Customs Agent in charge:

Whereas I, Wm. H. Smathers—a Judge of the Common Pleas of Atlantic County, New Jersey, upon consideration

of the facts set forth in the sworn complaint of Francis B. Laughlin (Official tile), Customs Agent in charge, filed with me, have examined said Francis B. Laughlin under oath, and

Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave. (Give full description of premises to be searched), Atlantic City, N. J.; and

Whereas said Francis B. Laughlin has requested that a warrant issue to him, authorizing him to enter said premises and search for and seize said merchandise:

Now, therefore, you are commanded, in the name and by the authority of the President of the United States, to enter and search the premises hereinbefore described, in the daytime (if a dwelling house) at any time of the day or night (if other than a dwelling house) and to seize and [fol. 15] take into your possession the merchandise hereinbefore described, or so much thereof as may be found, to the end that the same may be dealt with according to law.

You are further commanded, in the event that you seize any of the above described merchandise, to give a copy of this warrant, together with a receipt for the property so seized, to the person from whom it is taken or in whose possession it is found, or in the absence of such person, to leave a copy of this warrant, together with such receipt, in the place where said property is found.

You are further commanded to execute this warrant within ten days from the date hereof, and forthwith to make return thereof to me with a report of the execution of this warrant, and a written inventory of the property seized hereunder by you.

Witness my hand and the seal of my office this 1 day of May, 1930.

Wm. H. Smathers, C. P. Judge.

Cross-examination.

By Mr. Pearse:

Q. Now, this warrant was issued by William H. Smathers, County Judge of Atlantic County, was it not?

A. Yes.

Q. And you took the affidavit before him?

A. I did.

Q. And you stated in that affidavit that you had cause and suspicion and did believe that certain liquors of foreign origin were in these premises?

A. Yes.

Q. Which is a dwelling house, is it not?

A. Yes.

Q. Occupied by Mr. Nathanson, the defendant?

[fol. 16] A. Yes.

Q. And what was the basis of that belief upon which you made your affidavit before the County Judge?

A. That was based upon information received from the office of the prohibition agent in charge in Atlantic City, Mr. Porter, and as a result of a conference that I had there with Mr. Porter and some of his agents.

Q. So you go to a prohibition agent's office and you get information about intoxicating liquors in these premises and you and customs agents make an affidavit that you suspicion and believe that there is liquor of foreign origin and get this search warrant from a County Judge, when you knew that the prohibition agent could not do it himself; is that right?

A. Why, I get a search warrant of this nature on such information, if it confirms my own beliefs and leads me to believe that the merchandise is there.

Q. Now, you got information from the Prohibition Department, did you not?

A. Yes, which confirmed my own beliefs.

Q. You got information from the Prohibition Department that there was intoxicating liquor in this dwelling house, did you not?

A. Yes, that there were intoxicating liquors there.

Q. Were you told by the prohibition agent that it was a private dwelling?

A. I was aware of that fact.

Q. You were aware of that fact?

A. Yes.

Q. Did the prohibition agent tell you why he did not go out and get a search warrant?

A. I do not believe we discussed that.

Q. What did you discuss?

A. We discussed how we were going to find where the big stores of liquor were that I was interested in finding, and how I was going to go about finding them.

[fol. 17] The Court: What were the ones you were interested in finding? What do you mean by that?

A. We were interested, your Honor, in locating this source of smuggled liquor.

The Court: Then it was with relation to smuggling that you were interested in?

A. Yes.

Q. And, of course, you discussed with the prohibition agents the fact that they could not under the prohibition act get a search warrant to search a private house, unless they had proof of sale. You discussed that with them, did you not?

A. It is probable, but I do not recall it. I cannot say for a certainty.

Q. Did the prohibition agents tell you why they did not go and take out a search warrant to search these premises instead of just giving you the information?

A. I do not know. I do not look a gift horse in the face.

The Court: Is there any difference in smuggled goods in your jurisdiction and those that are made in this country? Do you have anything to do with intoxicating liquors made in this country and stored here, if it is not smuggled?

A. No, sir; I have no jurisdiction then.

The Court: Did that have anything to do with your interest in it at all?

A. That had everything to do with my interest in it. I was only interested in it as liquor that had been smuggled.

Q. Why didn't you get the prohibition agent then to make the affidavit?

A. He is not entitled to make an affidavit for a customs search warrant, according to my knowledge and belief.

[fol. 18] Q. So, according to your instructions, you, as customs men, are the only kind of men who may make that affidavit?

A. Yes, the only kind who may look for smuggled goods. That is my understanding.

Q. What did this prohibition agent tell you upon which you say you based your belief which you say you had when you made this affidavit?

A. He told me that he and his men had seen stuff moved into there and seen it moved out, and, of course, I knew the Nathansons already.

Q. When did they say it was done?

A. Oh, on various days.

Q. Did they say that they saw the labels on any of the stuff that came out?

A. No, it was always on the way in. It was always in sacks.

Q. Did they see the sacks?

A. On at least one occasion.

Q. Did they tell you why they did not stop it as it was going in then?

A. No, they did not go into that.

Q. Did they give you a date when they saw sacks going in?

A. No.

Q. You do not know whether it was a month before or year before?

A. It was not a year before.

Q. Did they tell you?

A. Yes, it was inside of a very short period before we were having this conference.

Q. How short was the period?

A. Within a week or two.

Q. What did they say to you that they saw?

A. They saw this merchandise going in.

Q. What did they say they saw going in?

A. Sacks going in.

[fol. 19] Q. Did they say they had ever seen the contents of the sacks?

A. No.

Q. And did they say at what time of day or night it was they were moved in?

A. Yes, they said on the occasion they were speaking of they had seen the sacks going in at night.

Q. Did they tell you why they did not seize them as they were going in?

A. They did not know what was in the sacks.

Q. And that is all the information you had?

A. No, that is the information I received through Mr. Porter in charge of the prohibition office.

Q. What other information did you have, if any?

A. I also at that time had additional information from an informer.

Q. Who was the informer and what did he tell you?

A. It would be against Government interests to state.

Mr. Griggs: I object.

The Court: Objection sustained.

Q. Did you tell the County Judge that you had information from an informer when you made this affidavit?

A. Yes.

Q. Did you tell him the name of the informer?

A. No.

Q. Why not?

A. In the first place, he was not interested.

Q. What was the name of the informer?

Mr. Griggs: I object.

The Court: Objection sustained.

Mr. Pearse: Now, if the Court please, so far as the information against Jeremiah J. Nathanson is concerned, that is the facts relating to that information.

The Court: Under Information 1916b?

[fol. 20] MOTION TO SUPPRESS EVIDENCE, ETC.

Mr. Pearse: Yes, as it will be amended. I move to suppress the evidence and I move to set aside the search warrant on the ground that it was not issued upon probable cause and that the warrant was void. And that the customs agent, under that warrant, had no right of entry into those premises. It now appears that it was a dwelling house. He refused to give the source of his information

and what information he did give on the witness stand did not show probable cause.

The Court: The form of the affidavit for the warrant was practically the same as in the others?

Mr. Pearse: Yes.

The Court: No special reason is given as to the form.

Mr. Pearse: No.

The Court: The motion will be denied.

Mr. Pearse: Your Honor will allow me an exception?

The Court: Yes.

(Defendant's counsel prays an exception, which is hereby allowed and sealed accordingly.)

John Boyd Avis. (Sealed.)

MOTION FOR DIRECTED VERDICT

Mr. Pearse: I now move for direction of a verdict.

The Court: The motion to direct will be denied. Do both parties rest?

Mr. Pearse: Yes.

The Court: A verdict of conviction will be rendered in that case under the evidence as against J. J. Nathanson.

Mr. Griggs: Now, the Government expects to prove the alleged violation on the same date against Martin Nathanson at 41 N. Newton Avenue, Atlantic City, N. J.

[fol. 21] Mr. Pearse: The same facts will appear?

Mr. Griggs: The same facts.

Mr. Pearse: May we stipulate then that so far as that case is concerned that, instead of encumbering the Circuit Court of Appeals with a long record in the event that the last case should be decided against Jeremiah J. Nathanson I will bring Martin Nathanson in and he will plead guilty.

The Court: If otherwise it will be nolle prossed? I should think that would be a fair agreement.

Mr. Griggs: Perfectly, sir.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL—Filed March 23, 1932

Now comes the defendant, J. J. Nathanson, and says that on the twenty-third day of March, 1932, this Court entered

judgment herein against him, in which judgment and the proceedings prior thereto, certain errors were committed, to the prejudice of this defendant, all of which will in more detail appear from the assignment of errors which is filed with this petition.

Wherefore the defendant, J. J. Nathanson, prays than an appeal may be allowed to the United States Circuit Court of Appeals for the Third Circuit, for the correction of the errors so complained of and that a transcript of the record, proceedings and papers in this cause, upon which the judgment herein was rendered, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Third Circuit.

Dated March 23, 1932.

Frederic M. P. Pearse, Attorney of Defendant.

[fol. 22] IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed March 23, 1932

This twenty-third day of March, 1932, comes the defendant, J. J. Nathanson, and files herein, and presents to the Court his petition, praying for the allowance of an appeal intended to be urged by him, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals, for the Third Circuit, and that such other and further proceedings may be had as may be proper in the premises.

It is, on this twenty-third day of March, 1932, ordered that the appeal as prayed for be and the same is hereby allowed, and that a citation be issued; and it is further

Ordered that the defendant, J. J. Nathanson, be admitted to bail pending the hearing and determination by the said Circuit Court of Appeals of the issues arising under said appeal, upon his giving bond according to the law in the sum of $1000, which is to operate as a supersedeas bond.

John Boyd Avis, U. S. D. J.

[fol. 23] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed March 23, 1932

Now comes J. J. Nathanson, defendant-appellant, and says that in the record, proceedings and judgment aforesaid, there is manifest error and for assignment thereof says that:

1. The Court erred in denying defendant's motion to suppress the evidence on the ground that such evidence was illegally obtained.

2. The Court erred in denying defendant's motion to set aside the search and suppress the evidence on the ground that there was no probable cause that a crime was being committed by the defendant.

3. The Court erred in pronouncing judgment against the defendant.

4. The judgment is contrary to law.

5. The Court erred in denying defendant's motion for a direction of a verdict.

6. The judgment is against the evidence.

7. The judgment is against the weight of the evidence.

Wherefore the defendant, J. J. Nathanson, prays that the judgment herein, for the errors aforesaid in the record and proceedings herein, may be reversed and annulled, and altogether held for nothing, and that the said defendant, J. J. Nathanson, may be restored to all things which he has lost by reason of said judgment.

Dated March 23, 1932.

Frederic M. P. Pearse, Attorney for Defendant

[fol. 24] Citation, in usual form, filed March 23, 1932, omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT

STIPULATION AS TO RECORD.

It is hereby stipulated and agreed by and between Harlan Besson, Esq., attorney for the plaintiff, and Frederic M. P. Pearse, attorney for the defendant, that the foregoing is a true transcript of the record of the said District Court in the above matter, as agreed upon by the parties.

Harlan Besson, United States Attorney, by John W. Griggs, Asst. U. S. Attorney. Frederic M. P. Pearse, Attorney for Defendant.

[fol. 26] Clerk's certificate to foregoing transcript omitted in printing.

[fols. 27 & 28] Minute entry of argument and submission, January 5, 1933, omitted in printing.

[fol. 29] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 4896

J. J. NATHANSON, Defendant-Appellant,

v.

UNITED STATES OF AMERICA, Plaintiff-Appellee

Upon Appeal from the District Court of the United States for the District of New Jersey

Before Buffington, Davis, and Thompson, Circuit Judges

OPINION—Filed March 1, 1933

THOMPSON, Circuit Judge:

A criminal information was filed in the court below against the appellant, J. J. Nathanson, charging possession of intoxicating liquor in violation of section 25 of Title II

of the National Prohibition Act (27 U. S. C. A. 39). By stipulation, the charge against the appellant was tried before the court without a jury. Prior to trial the appellant's petition that liquor, which had been seized, be returned because of the alleged invalidity of the search warrant, under [fol. 30] authority of which seizure was effected, and that the evidence be suppressed, was denied. At the trial the application was renewed by motion and again denied, and a fine of five hundred dollars imposed upon the defendant. From that judgment this appeal was taken.

It is contended for the appellant that the court erred in admitting in evidence liquor obtained under an unlawful search and seizure. The search warrant was issued upon affidavit of a customs agent before a county judge of Atlantic County, New Jersey. The customs agent had received information from prohibition officials and from an unnamed informer that liquor of foreign origin was concealed upon the appellant's premises. The affidavit of the customs agent set forth that the affiant "has cause to suspect and does believe that certain merchandise, to wit: liquors of Canadian and other foreign origin, a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson."

The appellant contends that the affidavit upon which the search warrant was issued showed no facts upon which to base a finding of probable cause; that the search warrant was therefore illegal; and that the use of the property so seized as evidence in a criminal prosecution amounted to a violation of the protection afforded by the Fourth Amendment to the Constitution which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[fol. 31] Had this warrant issued under authority of the Prohibition Act, it would be invalid, since the affidavit was merely based upon cause to suspect and suspicion. It

issued, however, under the authority of the Tariff Act of 1930 (19 U. S. C. A. Supp. 1595) which reads:

"If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise, upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he may make application, under oath, to any justice of the peace, to any municipal, county, State or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise."

These provisions differ but slightly from those of the Act of July 31, 1789, 1 Stat. 43, section 24, which was enacted by Congress almost at the outset of our national existence. Searches for contraband smuggled into the United States in fraud of the revenue, upon affidavits setting forth an allegation of probable cause based upon suspicion, have been sustained from the earliest times. Locke v. United States, 11 U. S. 337. In that case Chief Justice Marshall said, on page 347:

"It is contended, that probable cause means prima facie evidence, or, in other words, such evidence as, in the absence of exculpatory proof, would justify condemnation. This argument has been very satisfactorily answered on the part of the United States, by the observation, that this would render the provision totally inoperative. It may be added, that the term 'probable cause,' according to its usual acceptation, means less than evidence which would [fol. 32] justify condemnation; and in all cases of seizure, has a fixed and well-known meaning. It imports a seizure made under circumstances which warrant suspicion. In this, its legal sense, the court must understand the term to have been used by congress."

In Boyd v. United States, 116 U. S. 616, 623, 624, the Supreme Court, noting the intendment of the Fourth Amendment in cases concerning stolen goods, or property in which the government has an interest, as in the instant case, said:

"The search for and seizure of stolen or forfeited goods, or goods liable to duties and concealed to avoid the payment thereof, are totally different things from a search for and seizure of a man's private books and papers for the purpose of obtaining information therein contained, or of using them as evidence against him. The two things differ toto coelo. In the one case, the government is entitled to the possession of the property; in the other it is not. The seizure of stolen goods is authorized by the common law; and the seizure of goods forfeited for a breach of the revenue laws, or concealed to avoid the duties payable on them, has been authorized by English statutes for at least two centuries past; and the like seizures have been authorized by our own revenue acts from the commencement of the government.

* * * * * * *

"But, when examined with care, it is manifest that there is a total unlikeness of these official acts and proceedings to that which is now under consideration. In the case of stolen goods, the owner from whom they were stolen is entitled to their possession; and in the case of excisable or dutiable articles, the government has an interest in them for the payment of the duties thereon, and until such duties are paid has a right to keep them under observation, or to pursue and drag them from concealment; * * *".

[fol. 33] In Gouled v. United States, 255 U. S. 298, 308, Mr. Justice Clarke said:

"The wording of the Fourth Amendment implies that search warrants were in familiar use when the Constitution was adopted and, plainly, that when issued 'upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized,' searches, and seizures made under them are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and seizures are as constitutional under the Amendment when made under valid search warrants as they are unconstitutional, because unreasonable, when made without them—the permission of the Amendment has the same constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter. All of this is abundantly recognized in the opinions of the Boyd and

Weeks Cases, supra, in which it is pointed out that at the time the Constitution was adopted stolen or forfeited property, or property liable to duties and concealed to avoid payment of them, excisable articles and books required by law to be kept with respect to them, counterfeit coin, burglars' tools and weapons, implements of gambling 'and many other things of like character' might be searched for in home or office and if found might be seized, under search warrants, lawfully applied for, issued and executed."

In the instant case the seizure was under the tariff laws. The government had a pecuniary interest in the smuggled goods. Following the reasoning in the cases cited, we conclude that that interest was sufficient to justify the issuance of the search warrant and that the search and seizure, based on the sworn complaint (phrased almost in the very words of the Tariff Act) and the warrant thereon, did not violate the constitutional rights of the defendant. [fol. 34] This court in Bookbinder v. United States, 287 Fed. 790, certiorari denied 262 U. S. 748, held that evidence obtained on a search warrant for violation of the customs laws is admissible in a prosecution for violation of the prohibition laws.

We find no error in the refusal of the learned District Judge to suppress the evidence secured by the search. The judgment is affirmed.

A true copy. Teste:

——— ———, Clerk of the United States Circuit Court of Appeals for the Third Circuit.

[fol. 35] IN UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT, OCTOBER TERM, 1932

No. 4896

J. J. NATHANSON, Appellant,

v.

UNITED STATES, Appellee

On appeal from the District Court of the United States for the District of New Jersey

JUDGMENT—Filed March 1, 1933

This cause came on to be heard on the transcript of record from the District Court of the United States, for the District of New Jersey, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

Philadelphia, March 1, 1933.

J. W. Thompson, Circuit Judge.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 29, 1933

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit is granted, and the case is assigned for argument on Monday, October 9 next, after the case heretofore assigned for that day.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 37,612. U. S. Circuit Court of Appeals, Third Circuit. Term No. 39. J. J. Nathanson, petitioner, vs. The United States of America. Petition for a writ of certiorari and exhibit thereto. Filed April 26, 1933. File No. 39, O. T. 1933.